NO. 09-35826

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON,

Plaintiffs/Appellees,

v.

SAM REED, in his official capacity as Secretary of State of Washington, BRENDA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington,

Defendants/Appellants.

On Appeal From The United States District Court
District Of Washington, At Tacoma

No. C09-5456BHS
The Honorable Benjamin H. Settle
United States District Court Judge

BRIEF OF APPELLANT WASHINGTON COALITION FOR OPEN GOVERNMENT

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FRAP 26.1 CORPORTATE DISCLOSURE STATEMENT

The Washington Coalition for Open Government ("WCOG") is a non-partisan, non-profit public interest organization. WCOG does not issue stock, and no parent corporation or any publicly traded corporation owns 10% or more of WCOG stock.

/ s/ Steven J. Dixson
Steven J. Dixson

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I. STATEMENT OF JURISDICTION

The District Court had jurisdiction over the subject matter of this dispute under 28 U.S.C. § 1331 and 42 U.S.C. § 1983, because the Plaintiffs' claims were based on the First Amendment of the United States Constitution. The District Court filed its Order Granting Plaintiffs' Motion for Preliminary Injunction on September 10, 2009. Intervenor Washington Coalition for Open Government ("WCOG") filed its Preliminary Injunction Appeal on September 15, 2009. The Court, *sua sponte*, consolidated for purposes of expedited review, the appeal previously filed by the Appellant State Officials (Ninth Circuit Cause No. 09:35818) and WCOG's appeal (09:35826). The Court of Appeals has jurisdiction under 28 U.S.C. § 1292(a)(1), because a preliminary injunction is an interlocutory order that may be appealed. WCOG's appeal was timely filed pursuant to Fed. R. App. P. 4(a)(1).

II. STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

WCOG adopts the Statement of Issues presented and Standard of Review set out in the Brief of Appellant State Officials with the following additional Statement of Issues:

1. The Washington State Constitution vests the legislative powers of the State in the Legislature, provided, however, that "the people reserve to themselves" the legislative power to propose and enact referendums. Wash. Const., Art. II, Section (1)(b). Where, pursuant to the State Constitution, signers of a referendum petition are acting in a legislative capacity, is such legislative action a public act not subject to Constitutional protection under standards promulgated to protect anonymous political speech?

2. Washington State's Public Records Act, RCW 42.56, was adopted by initiative of the people of the State of Washington in 1972 as the key mechanism to provide oversight by the public of the actions of governmental officials and to provide the citizens of the State with necessary information to

make informed decisions about the conduct of government. It is conceded in this litigation that no provision of the Public Records Act, nor any other State law, exempts from public disclosure the referendum petitions in question. Where the history of the Public Records Act evinces a strong public policy mandating public access to public records so as (1) to allow public oversight of government actions, and (2) to provide important information to the public to evaluate proposed government actions, does such a strong mandate constitute a compelling interest in public disclosure of the referendum petitions, assuming, for the sake of argument, public disclosure implicates a Constitutional issue?

III. STATEMENT OF THE CASE

Appellant WCOG adopts the Statement of the Case set out in the Brief of Appellant State Officials, with the following addition.

The Washington Public Records Act was adopted by initiative of the people in 1972. Its preamble, which was also

the preamble to the initiative, states, in part, that "the people insist on remaining informed so that they may maintain control over the instruments that they have created." RCW Sec. 42.56.030. The parties to this litigation concede that there is no exemption under the Public Records Act or elsewhere in Washington law exempting the referendum petitions from public inspection.

IV. STATEMENT OF FACTS

Appellant WCOG adopts the Statement of Facts set out in the Brief of Appellant State Officials with the following additions.

Appellant WCOG is a non-partisan, nonprofit group, whose primary function is promotion of open government in the State of Washington. On July 31, 2009, WCOG President, Toby Nixon, made a public records request to inspect the signed petitions pertaining to Referendum 71. ER 006. Appellant State Officials responded that the petitions could not be publically disclosed because of the temporary restraining

order entered by the District Court. Subsequently, the District Court has enjoined Appellant State Officials from disclosing to the public the petitions.

Referendum 71 is scheduled to be presented to the voters of the State of Washington on November 3, 2009. Because of the injunctive order entered by the District Court, WCOG, and the citizens of the State of Washington generally, are prohibited from being able to fulfill the oversight function contemplated by the Public Records Act because: (1) the public has no ability to review the actions of the State Officials in validating signatures on the referendum petitions because access to the petitions, which provides the only mechanism for reviewing the signatures, has been denied; and (2) the public has been denied the ability to evaluate Referendum 71 based on who requested the same, which can be determined only by a review of the signed petitions.

V. SUMMARY OF ARGUMENT

The District Court's Order granting Plaintiffs' Motion for Preliminary Injunction prohibiting release of signed referendum petitions, required pursuant to Washington's Public Records Act, fails to distinguish between citizens acting as legislators, pursuant to the Washington State Constitution, and citizens engaging in political speech that merely advocates on a political issue. The legislative process is one that has a long history of openness in the United States, a non-confidential process that is substantially undercut by the District Court's Order.

Secondly, the District Court's Order fails to take into account that the sponsors of Referendum 71 (the "Sponsors")[1] did not mount any challenge to the required submission to the State of signatures, including names and addresses of citizens sponsoring the legislation. In other words, the Sponsors have acknowledged that there is no Constitutional basis to challenge such required disclosure; yet the District Court's Order focuses

[1] For ease of the Court, WCOG adopts the terms used in the State of Washington's Opening Brief.

on the signing of the petitions as political speech, when the issue at hand is public disclosure of the petitions after they had been filed with the State. Since it is conceded that the Public Records Act does not compel execution of the referendum petitions, it does not constitute an infringement on the signers' asserted Constitutional rights.

Third, even assuming for the sake of argument that there are Constitutional implications concerning public disclosure of the referendum petitions, the affidavits submitted by the Sponsors do not establish a reasonable probability that unwarranted harm will result to the signers if the petitions are publicly disclosed. Mere threats, purported harassment or criticism, if the petitions are made public, do not satisfy the required standard to justify treating the petitions as confidential records.

Fourth, although the strict scrutiny standard is inappropriate because citizens are acting as legislators in signing the petitions but are not compelled to sign the same,

even, assuming for the sake of argument, that the standard is applicable, there are compelling interests, which form the foundation of the Public Records Act, to require public disclosure of the referendum petitions. The principles of the Public Records Act, as set out in RCW 42.56.030, establish that the Act is necessary so that the citizens of the State of Washington can monitor and oversee the actions of public officials and fully understand the workings of government. Although State Officials have been able to review the signatures on the referendum petitions for purposes of validation, pursuant to RCW 29A.72.230, the public, including WCOG, by being denied access to the referendum petitions, has no ability to determine if the State Officials acted appropriately in the validation process. The only mechanism for such a determination is review of the petitions themselves.

Referendum 71 is scheduled for a vote by the citizens of the State of Washington on November 3, 2009. However, the citizen voters have been denied the fundamental opportunity of

knowing who the citizen legislators are who asked that the Referendum be submitted to the voters. Were the signatures primarily from individuals residing in a specific geographic location in Washington, were the signatures by members of groups that have a special interest motive, and did state officials or influential citizens sign the petitions? Citizens often evaluate ballot measures, not only based on what the ballot measures say, but as to who supported the measure. This fundamental knowledge and ability to evaluate Referendum 71 is being denied to the citizens of the State of Washington by treating the referendum process as confidential.

VI. ARGUMENT

A. Preliminary Injunction Is an Extraordinary Remedy.

As noted in the Brief of Appellant State Officials, a preliminary injunction is never awarded as a matter of right, but is "an extraordinary remedy." *Winter v. Natural Resource Defense Council, Inc.*, _____ U.S. ____, 129 S.Ct. 365, 376, 172 L.Ed.2d 249 (2008). Not only must a plaintiff seeking to

impose a preliminary injunction establish irreparable harm by clear and convincing evidence, *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 442, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974), the plaintiff must also demonstrate that an injunction is in the "public interest." *Id*. at 374. It is difficult to comprehend how denying citizens of the State of Washington the fundamental tool of knowing who has requested a referendum seeking to change a law enacted in the most recent session of the State Legislature serves the public interest.

B. Under Washington's Constitution, Signers of the Petition Are Acting as Legislators and the Legislative Process is a Traditionally Open Process.

The District Court declared that signing a petition requesting a public referendum is anonymous political speech. ER 009. In making this statement, the District Court turned on its head the lengthy history of open legislative process in this country.

In particular, Article II, Section 1, of the Washington State Constitution, states that, while legislative powers are

generally vested in the Legislature, "the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the Legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act, or law passed by the Legislature." Article II, Section 1(b) states that this legislative power reserved to the people includes the power of referendum, which requires the submission to the State of petitions signed by a required percentage of legal voters. The legislative power reflected in the referendum process is so significant that "the veto power of the Governor shall not extend to measures initiated by or referred to the people." Article II, Section (1)(d). In other words, legislation that originates in referendums is given a special status even more significant than laws passed by the State Legislature, in that legislation by referendum cannot be vetoed by Washington's governor.

The referendum process is a decidedly public process. State law requires that referendum petitions must be signed by Washington voters and that the process must include printing of the signer's name, address, town or city, and county of residence. RCW 29A.72.130, 150. Signers' names are included on petitions that are made available to signature gatherers, ER 25, 34-35, and the signatures are made available for review because the signatures are included on petitions containing as many as nineteen (19) signatures of other persons, all of whom have the ability to read information about other signers as the petitions are signed. ER 068-069.

Persons engaged in the gathering of signatures are not prohibited from compiling lists of names and addresses on the petitions. Once submitted to the State, the signatures may be reviewed by both opponents and proponents of the referendum petition and are reviewed by State Officials as part of the validation process.

Openness of the process concerning legislation by referendum is not dissimilar to the process whereby laws are enacted by the State Legislature. In the latter case, the identity of bill sponsors, and other legislators who sign on as advocates of legislation, are made known to the public so that the public can evaluate the proposed legislation, not only based on the substantive provisions of the legislation, but on who supported a particular bill. Certainly, the legislative process in which Senate Bill 5688, which is the subject of the referendum petitions at bar, was adopted was a very public process.

The importance of public discussion of political issues has been recognized by the Supreme Court. Justice Brandeis, concurring, in *Whitney v. California*, 274 U.S. 357, 375-77, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) analyzed the concepts of public discussion and free expression in discussing the beliefs of "those who won our independence":

> They believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion

> would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrines; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order could not be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breads repression; that repression breads hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil councils is good ones. Believing the power of reason is applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed. (Emphasis supplied.)

Nevertheless, in the case at bar, the Sponsors promote the concept whereby a fundamental part of what is normally public discussion on a significant issue is eliminated—that is, who are the citizen legislators that have requested the State to put on the ballot a measure to overturn an enactment of the State Legislature. Are the signers of the petitions members of a

narrowly focused special interest group; are the signers of the petitions representatives only of a small geographic area in the State of Washington; are the signers of the petitions government officials or prominent citizens of the State?

An act of a citizen that, pursuant to the State Constitution, evidences legislative power, is an act to be distinguished from pure speech that may merely advocate support for or opposition to an issue. The legislative act of executing a referendum petition goes far beyond mere advocacy by the citizenry as to a political issue. Persons who execute a referendum petition are acting as legislators in proposing laws for adoption.

The legislative process has long been held to be an open procedure. In 1873, a District of Columbia court upheld the openness of legislative proceedings in striking down a contract to procure influence by secret. *Child v. Trist*, 1 Mac.Arth. 1, 2 (D.C. Dist. Court 1873) ("all contracts to procure or influence legislation by secret means, or by any method likely to mislead

or deceive members of legislative bodies, were utterly void as in violation of public policy and good morals.")

Other case law supports keeping open the legislative process. "This Court finds that the existing case law and good sense compel its conclusion that the first amendment mandates that the legislative process be made generally available to the press and to the public." *WJW-TV, Inc. v. City of Cleveland*, 686 F.Supp. 177, 180 (N.D. Ohio 1986), judgment vacated by *WJW-TV, Inc. v. City of Cleveland*, 878 F.2d 906 (6th Cir. 1989). As the Sixth Circuit has held, "an informed public is the most potent of all restraints upon misgovernment. [They] alone can here protect the values of a democratic government." *Detroit Free Press, et. al. v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2003). In *Detroit Free Press*, the court noted that "[w]hen government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment 'did not trust any government to separate the true

from the false for us.'" *Id.*, quoting *Kleindeinst v. Mandel*, 408 U.S. 753, 773, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972); see also *Int'l Fed. of Professional & Technical Engineers, Local 21 v. Superior Court*, 42 Cal.4th 319, 165 P.3d 488 (2007) ("access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."

Pursuant to the Washington State Constitution, the referendum process empowers citizens to be legislators, and legislators are responsible to their constituents. *Mitchell v. Forsyth*, 472 U.S. 511, 522 (1985), citing *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951). "In a democracy, it is the electorate that holds the legislators accountable for the wisdom of their choices." *I.N.S. v. Chadha*, 462 U.S. 919, 997 (1983). "Legislative and executive officials serve in representative capacities. They are agents of the people; their primary function is to advance the interests of their constituencies." *Republican Party of Minnesota v. White*, 536 U.S 765, 805 (2002)

(distinguishing a legislative or executive election from one which elects judicial candidates). Here, the petition signers take on the role of legislators. Because legislation is an open process and legislators are beholden to their constituents, the process must remain open.

The Supreme Court has reserved to the states the issue of how to regulate the voting process. *Taylor v. Beckham*, 178 U.S. 548, 595, 20 S.Ct. 1009, 44 L.Ed. 1187 (1900). Under Washington law, the legislature has decided only that ballots as to how citizens voted are not subject to public disclosure. RCW 29A.04.206. However, the State of Washington has not pronounced that the signers of a referendum petition are entitled to such anonymity. In fact, the State has a process whereby a citizen can challenge the State's validation of signatures. RCW 29A.72.240. It necessarily follows that, in order to challenge the validation process, the signatures must be made available to the public in order that citizens can make an informed decision whether the validation process was

undertaken appropriately by State officials and whether, as a result, a challenge to the process should be pursued. However, because of the District Court Order, such public oversight has been denied.

Legislative action taken by citizens in signing a petition calling for a referendum, on the continuum of speech, is a far different matter than speech that renders an opinion as to support of and the soundness of potential legislation. While the latter has sometimes been afforded Constitutional protection, no case law, as the District Court noted in its Order, has addressed any limitation on public disclosure of signed referendum petitions. ER 001-017.

C. Constitutional Protection is Not Mandated Where the State Does Not Compel Individuals to Sign Referendum Petitions.

The District Court Order focuses on the asserted protected act in this matter being the signing of the referendum petition. However, the District Court Order fails to take into account that there is no provision under the Public Records Act,

which was the subject of the Court's declaration of unconstitutionality, that in any fashion compels an individual to sign a referendum petition.

In other words, the Sponsors have implicitly conceded that Washington statutes which compel citizens who support a referendum to sign a petition and print their names, addresses and county of residence for submission to the State, are not unconstitutional since the State has a valid and compelling interest in validating the signatures contained on the referendum petitions. In contrast, as argued in the brief of the Appellant Public Officials, all the cases relied on by the District Court involve situations where individuals were compelled to provide information to the State. That is not the situation in the case at bar, where the State in no fashion compels any person to execute a referendum petition.

Furthermore, none of the cases on which the District Court relied involve the signing of referendum petitions. Rather, the cases were concerned only with processes and

procedures related to potential legislation, but not the legislative act of citizens, as set out in the Washington Constitution, in proposing the legislation itself.

As the Appellant State Officials correctly point out in their brief, the strict scrutiny standard implicated in "anonymous" speech cases, thus, is not applicable to the case at bar.

D. The Sponsors' Evidence Does Not Rise to the Level of Supporting Injunctive Relief.

In their Opposition to Appellant's Emergency Motion to Stay and Expedite, the Sponsors state that the basis for seeking injunctive relief stems from two groups who are opponents to Referendum 71 and who "have publicly stated that they intend to publish the names of petition signers on the internet and to make the names searchable, with a goal of encouraging individuals to have personal and uncomfortable conversations with any individual that signs a petition." (Emphasis supplied.) Opposition, at p. 4. While the Sponsors submitted declarations to support their request for injunctive relief, ninety-five percent

of these declarations originated with a case brought by plaintiffs in the State of California, *ProtectMarriage.Com v. Bowen*, 599 F.Supp.2d 797 (E.D. 2009)[2], ER 131-465; only three John Doe declarations are from individuals who signed Referendum 71, and two of these were active in the public gathering of signatures. ER 024-043.

Thus, the Sponsors premise their request for relief (1) on affidavits of individuals who primarily reside in the State of California and have not signed the referendum petitions, and (2) out of concern that signers might be exposed to "personal and uncomfortable conversations."

The history of this country is replete with situations where advocates of legislation have been subjected to "personal

[2] In ProtectMarriage.com, the plaintiffs sought to enjoin release of the names and addresses of persons that had contributed $100 or more to a political ballot committee, the reporting of which is mandated by Cal.Gov.Code §§ 84200 and 84211(f). The ProtectMarriage.com plaintiffs asserted allegations of alleged injury almost identical to the submissions pending before this Court. The District Court for the Eastern District of California, considering the purported harms, denied the plaintiffs' motion for preliminary injunction due to their failure to establish a substantial likelihood of success on the merits. *ProtectMarriage.com*, 599 F.Supp.2d at 1226.

and uncomfortable conversations" with persons who are on the opposite side of a measure. In fact, such occasional vitriolic public discourse is part and parcel of the American political process.

The Sponsors assert that, if the names of petition signers are released to the public and subsequently published, the individuals who signed the petition may potentially be engaged in "personal and uncomfortable conversations" with those who disagree with their political views. Such alleged harm is antithetical to the democratic process in our country, where the right to vigorous, spirited, and sometimes colorful debate is closely guarded by the courts.

American courts have long recognized that disagreements and exchanges between opposing parties are a routine part of political life and do not provide a basis for legal sanctions: "Words spoken that are merely vituperative, or insulting… are not regarded by the common law as sufficiently substantial to be treated as injuries calling for redress in

damages." *Mosely v. Moss*, 6 Gratt. 534, *3 (Virginia 1850). Statements alone, no matter how distasteful, do not give rise to redress: "It is axiomatic that opprobrious epithets, even if malicious, profane and in public, are ordinarily not actionable." *Bartow v. Smith*, 78 N.E.2d 735 (Ohio 1948), *rev'd on other grounds*, *Yaeger v. Local Union 20*, 453 N.E.2d 666 (1983). Courts are loathe to invoke defamation or libel remedies when mere words are involved, noting that these comments, although crude, are "rhetorical hyperbole, a vigorous epithet used by those who considered [the plaintiff's] negotiating position extremely unreasonable." *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6, 13-14, 90 S.Ct. 1537, 26 L.Ed.2d (1970) (rejecting a developer's action for defamation against a newspaper that used the word "blackmail" to describe some of a developer's negotiation tactics). As Dean Prosser wrote in the Restatement (Second) of Torts, "a certain amount of vulgar name-calling is tolerated, on the theory that it will

necessarily be understood to amount to nothing more." PROSSER & KEETON ON TORTS, § 111, at 776 (5th ed. 1984).

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court affirmed the importance of free political debate, and the sometimes heated exchanges that come with it:

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' '[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions,' and this opportunity is to be afforded for 'vigorous advocacy' no less than 'abstract discussion.' The First Amendment, said Judge Learned Hand, presupposes that right conclusions are more likely to be gathered out of a multiple of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'

New York Times Co. v. Sullivan, 376 U.S. at 269-270 (internal citations omitted).

The United States maintains a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks" on those officials or individuals who speak out on behalf of a particular principle. *Id.*, at 270. The Sponsors' complaint that publication of the petition signers' names and addresses would lead to "personal and uncomfortable conversations" concerns precisely the type of speech our nation holds sacred. To promote secrecy to avoid vigorous debate amongst individuals would be an affront to our jealously guarded belief in open discourse, a belief that has withstood centuries of robust give-and-take. Disclosure of the Referendum 71 signatories would not create an unconstitutional chilling or restriction of free speech; instead, it would further a tradition of openness and promote public discourse.

If insulating persons from criticism as to why they support a particular position becomes the basis for imposing confidentiality as to the legislative process, then the value of public discussion, as so artfully outlined by Justice Brandeis in the *Whitney v. California* case, *supra*, is destroyed. Imagine a situation where a city council proposes to take public testimony on a controversial proposed city ordinance. Should the potential of persons favoring or disfavoring the ordinance being subjected to "personal and uncomfortable conversations" lead to the situation where testimony is taken anonymously, behind closed doors or with screens protecting the identity of the person seeking to testify? Such procedure, of course, would be viewed as inimical to the fundamental principle of public discussion of public issues.

Rather than seeking particularized injunctive relief against individuals or groups who might step over acceptable bounds concerning hostile conduct aimed at those signing the petitions, the Sponsors took the overbroad approach of seeking

to bar all citizens in the State of Washington from reviewing the petitions in question, regardless of the motivation of the citizens in reviewing the petitions. In other words, in order to avoid potential "personal and uncomfortable conversations," the Sponsors, as supported by the District Court, have swept under the rug the rights of all citizens of the State of Washington, as evidenced in the Public Records Act, to oversee the conduct of their government officials and to fully comprehend and understand the merits of the referendum petition on which they are being asked to vote on November 3, 2009.

E. The Dual Principles of Citizen Oversight of the Conduct of Government Officials and Public Understanding of the Legislative Process Provide a Compelling Basis for Public Disclosure of the Referendum Petitions.

The Washington Public Records Act was adopted by initiative of Washington State voters in 1972 in reaction to issues concerning perceived government secrecy in the 1960s. The Public Records Act contains a strongly worded mandate for access:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected.

RCW § 42.56.030.

Washington courts have repeatedly recognized the important government accountability function that the Public Records Act serves. See, e.g., *Progressive Animal Welfare Society v. Univ. of Washington ("PAWS II")*, 125 Wn.2d 243, 884, P.2d 592 (1994). The *PAWS II* court wrote: "The stated purpose of the Public Records Acts is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming

government of the people, by the bureaucrats, for the special interests." *PAWS II*, 125 Wn.2d at 251.

The unwanted specter of government by special interest groups referenced in the *PAWS II* opinion is directly implicated by the District Court's Order in this matter. Because of the Order, the public has been blocked from any understanding or review of the validation process. As a result, the actions of the state officials (as potentially overseen only by opponents and proponents of the referendum petition although the record in this case does not establish that any proponents or opponents were even part of the process of validation) has been completely foreclosed. Thus, there is no accountability to the people of the State of Washington of the public officials involved in the validation process because the referendum petitions, which are the only record of the signatures, have not been disclosed for public review, even though it is conceded there is no provision in the Public Records Act or any other statute of the State of Washington that prohibits such

disclosure. Because of the District Court's Order, a process that involves a request to negate an act of the Legislature that was debated and voted on in public with legislators taking public stances on the advisability of adopting the legislation, will proceed to a referendum as demanded by, in the words of the District Court, "anonymous" political speech, an anomaly if there ever was one.

What is happening in this case is exactly what the Washington Supreme Court feared, as expressed in the *PAWS II* decision, that the process of reviewing significant legislation has evolved into an activity of the "special interests," as represented by Protect Marriage Washington, which is a single-purpose organization dedicated solely to the definition of marriage as "one man, one woman" and the rejection of a Senate Bill that enacted in Washington expansion of benefits to domestic partnerships.

The compelling interests, as reflected in the underlying principles of the Public Records Act, are not satisfied by having

the State conduct its review of the referendum petitions in a confidential setting. At the heart of the Public Records Act, adopted by initiative of the people of the State of Washington, is the principal of oversight by the public of the actions of government officials so that they can be accountable to the public. Having selected special interest groups potentially being able to review the process of validation of the signatures by the State does not satisfy the ability of the public to oversee the process, but rather converts it into a process that favors and is inclusive of only special interest groups, a concept that is inimicable to the underlying principles of the Public Records Act.

Blocking public disclosure of the petitions also prevents the public from being able to understand who the backers of the petition are, whether they are State officials or influential citizens in the State of Washington, and where generally the support for the referendum is coming from. Do the petitions originate in an isolated geographic section of the State or do the

petitions reflect that there is widespread support across the State for the referendum being placed on the ballot? Do the signatures reflect that members of certain groups in the State are the primary backers behind the referendum petition?

Just as the public has an abiding interest in understanding which legislators are proposing legislation in evaluating the merits of the legislation, so does the public have an abiding interest in understanding who the backers of a referendum petition are, particularly where, pursuant to the Washington Constitution, such referendum signers are acting as legislators.

This Court has recognized the informational interest of the public in requiring those who expressly advocate the defeat or passage of a ballot measure to disclose their expenditures and contributions. *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088 (9th Cir. 2003). In discussing that the State of California has a compelling interest in requiring disclosure of monetary support for ballot measures, this Court noted:

> Voters act as legislators in the ballot-measure context, and interest groups and individuals

> advocating a measure's defeat or passage act as lobbyists; both groups aim at pressuring the public to pass or defeat legislation. We think Californians, as lawmakers, have an interest in knowing who is lobbying for their vote…

328 F.3d at 1106.

Because they have executed referendum petitions, the signers of the petitions are taking a significant step as citizen legislators and the rest of the citizens of the State certainly have an interest in knowing who is promoting the legislation that they are now being asked to vote on, just as Californians, as lawmakers, had an interest in knowing who was lobbying for their vote. In *Getman*, the Court cited with favor the rationale for public disclosure of supporters of legislation espoused by the Supreme Court in *United States v. Harriss*, 347 U.S. 612, 625, 74 S.Ct. 808, 98 L.Ed. 989 (1954).

Said the court in *Harriss*:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their

> ability to properly evaluate such pressures. Otherwise the voice of the people may all to easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent. *Id.*

In analyzing California's Political Reform Act requiring reporting of certain political contributions, this Court stressed how important it is for voters to understand who the backers of ballot initiatives are.

> Even more than candidate elections, initiative campaigns have become a money game, where average citizens are subjected to advertising blitzes of distortion and half-truths and are left to figure out for themselves which interest groups pose the greatest threat to their self-interest, knowing which interested parties back or oppose a ballot measure is critical, especially when one considers that ballot-measure language is typically confusing, and the long-term policy ramifications of the ballot-measure are often unknown. At least by knowing who supports or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation.

Getman at 328 F.3d at 1105-1106.

In Washington, the backers of the legislation are not merely the special interest group Protect Marriage Washington.

Rather, the backers and legislative proponents of Referendum 71 are the signers of the referendum petitions. It is not Protect Marriage Washington which has the ability to place Referendum 71 before the voters of the State. Rather, it is those individuals who signed the petitions who are vested by the Washington Constitution with legislative powers. Only by being able to review the petitions themselves will the voters of the State of Washington have the opportunity to know precisely who the supporters of the referendum are, by geographic location, etc.

Foreclosing, as the District Court did, the public from knowing which citizens are asking for a change in the law as to the November 3, 2009 referendum issue prevents valuable information from being provided to the public as part of the citizens' evaluative process concerning Referendum 71.

VII. CONCLUSION

For the reasons stated herein, the preliminary injunction granted in this case should be reversed.

Respectfully submitted this 23rd day of September, 2009.

WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S.

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STATEMENT OF RELATED CASES

1. *John Doe #1, et. al. v. Sam Reed*, 9th Cir. #09-38518

This case, *John Doe #1, et. al. v. Washington Coalition for Open Government*, 9th Cir. #09-35826, has been administratively consolidated by the Court for purposes of expedited review with *John Doe #1, et. al. v. Sam Reed*, 9th Cir. #09-35818.

2. *John Doe #1, et. al. v. Arthur West*, 9th Cir. #09-35832

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I certify that pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 5,863 words.

September 23, 2009
Date

/s/ Steven J. Dixson
Steven J. Dixson
WSBA #38101

9th Circuit Case Number(s) 09-35818, 09-35826

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